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# **CHINA'S PRACTICE OF PROCURING ORGANS FROM EXECUTED PRISONERS: HUMAN RIGHTS GROUPS MUST NARROWLY TAILOR THEIR CRITICISM AND ENDORSE THE CHINESE CONSTITUTION TO END ABUSES**

**Joan E. Hemphill<sup>†</sup>**

*Abstract:* For the past two decades, human rights groups, medical organizations, and the international media have excoriated China for procuring transplant organs from executed prisoners. This practice was first authorized under China's 1984 "Temporary Rules Concerning the Utilization of Corpses or Organs from the Corpses of Executed Criminals" and it is widely used by the Chinese government. Reports from Chinese doctors and media sources reveal significant deficiencies both in the text and application of China's current organ-procurement laws. The lack of clear legal parameters and the absence of enforcement measures have opened the door to problems of interpretation and misapplication, resulting in the physical abuse of prisoners. This situation is further exacerbated by China's proclivity to sell prisoner organs to foreign buyers on the black market. For these reasons, advocacy groups view China's procurement of prisoner organs as an infringement of prisoner rights, and they promote its abolition.

In response to international concern over China's participation in the organ trade, the Chinese government recently enacted the 2006 "Provisions on the Administration of Entry and Exit of Cadavers and Treatment of Cadavers," which prohibit organs from exiting Chinese territory without government authorization. Although it is premature to fully assess the efficacy of this law, the 2006 Provisions fail to modify the 1984 Order, leaving its most significant shortcomings intact. The 2006 Provisions do not regulate organ procurement from prisoner cadavers, nor do they address how organ-removal procedures are conducted or applied. China's present organ-procurement scheme is, consequently, inadequate to protect prisoners from abuse. Human rights groups continue to press for reforms in China's organ-procurement practice, but current lobbying efforts are ineffective because they lack compelling legal and political force in the Chinese system. Human rights groups must provide stronger legal support, and narrow the focus of reform efforts to make a more persuasive argument for the elimination of prisoner abuse. China's constitution provides a viable legal foundation for reform arguments because it requires the Chinese government to preserve and protect human rights. It is binding on all national laws, and it can be implemented to end prisoner abuse by requiring organ-procurement laws to conform to its proscriptions. Instead of pressuring China to enact sweeping legislation and adopt international ethical standards, reform efforts must endorse the application of Chinese constitutional human rights requirements to improve the treatment of prisoners in the organ-procurement practice.

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## I. INTRODUCTION

In 2001, Chinese surgeon Dr. Wang Guoqi testified before the United States Congress that he performed more than 100 operations to remove skin and corneas from executed prisoners.<sup>1</sup> Although the practice of procuring organs from prisoner cadavers is legal in China, Dr. Guoqi described ways in which prisoners were abused during the process.<sup>2</sup> He emphasized one particular incident in 1995 that has “tortured [his] conscience to no end.”<sup>3</sup> The incident occurred in the Hebei Province, where Dr. Guoqi and a team of doctors were called to extract skin and kidneys from a prisoner’s body.<sup>4</sup> During the execution, the guard misfired his gun, shooting the prisoner several inches short of the target, and leaving him convulsing on the ground.<sup>5</sup> Although the prisoner was still alive, the supervising official ordered the doctors to proceed with organ removal in a nearby ambulance.<sup>6</sup> The prisoner continued to breathe even after both of his kidneys were extracted.<sup>7</sup> While officials rushed the kidneys to medical units, Dr. Guoqi and his colleagues began to remove the skin from the prisoner’s half-dead body.<sup>8</sup> Hearing noises outside and fearing an attack from the prisoner’s family, the doctors forced the mangled prisoner into a plastic bag, and left him to die.<sup>9</sup> Haunted by this and other memories of prisoner abuse, Dr. Guoqi ultimately refused to participate in the organ-procurement practice.<sup>10</sup> He was subsequently forced to submit a pledge not to expose his work, nor

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<sup>1</sup> *Organs for Sale: China’s Growing Trade and Ultimate Violation of Prisoners’ Rights: Hearing Before the Subcomm. on Intl. Operations and Human Rights of the H.R. Comm. on Intl. Relations*, 107th Cong., 57-58 (2001) [hereinafter *Hearings*] (statement of Dr. Wang Guoqi, discussing his experience in China’s organ-procurement practice at the Tianjin General Brigade Hospital in Tianjin, China); *contra China Fury at Organ Snatching ‘Lies,’* BBC NEWS, June 28, 2001, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1411389.stm> (rebuking Dr. Guoqi’s testimony as lies and fabrications, without denying Chinese government used organs from executed prisoners).

<sup>2</sup> *Guanyu Liyong Sixing Zuifan Shiti Huo Shiti Qiguan de Zanxing Guiding*, in *Zhonghua Renmin Gongheguo Falu Guifanxing Jieshi Jicheng* [Temporary Rules Concerning the Utilization of Corpses or Organs from the Corpses of Executed Criminals] [hereinafter 1984 Order] (authorizing the use of organs from executed prisoners for transplant and research purposes), see *Hearings*, *supra* note 1, at 50-53, 57-59 (providing both a Chinese and an English version of China’s 1984 Order, and discussing how prisoners are abused during organ-procurement procedures); HUMAN RIGHTS WATCH/ASIA, Country Report 1994: *Organ Procurement and Judicial Execution in China*, August 1994, available at [http://www.hrw.org/reports/1994/china1/china\\_948.htm#N\\_100A](http://www.hrw.org/reports/1994/china1/china_948.htm#N_100A) (providing an English translation of China’s 1984 Order).

<sup>3</sup> *Hearings*, *supra* note 1, at 58-59.

<sup>4</sup> *Id.* at 58.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 58-59.

<sup>7</sup> *Id.* at 59.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

to reveal that organs are sold for profit by the Chinese government.<sup>11</sup> When Dr. Guoqi left China in 2000, the Chinese government was still procuring organs from prisoner corpses at execution sites.<sup>12</sup>

Evidence of physical abuse, such as that witnessed by Dr. Guoqi,<sup>13</sup> has prompted international criticism of China's practice of procuring organs from executed criminals.<sup>14</sup> Critics of China's organ-procurement practice assert that it compromises the legitimate administration of China's penal process, and results in brutal forms of prisoner abuse.<sup>15</sup> Human rights groups press China to reform both the organ-procurement and death-penalty practices, but these efforts unnecessarily expand the scope of the issue beyond the elimination of prisoner abuse, and misguidedly promote China's adoption of international standards on human rights.<sup>16</sup> For this reason, a

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *Hearings*, *supra* note 1, at 63 (testifying before the U.S. Congress, Doctor Thomas Diflo, a New York-based surgeon, said "there are numerous eyewitness accounts of continued movement and heart activity in some of the prisoner/donors, indicating that these people have been subject to the removal of their organs while they are, strictly speaking, still alive." Dr. Diflo condemns the practice of procuring and selling Chinese prisoners' organs, stating "this [practice] obviously represents a significant breach of medical ethics for these doctors in that the primary tenet of our profession, to do no harm, is violated on a continuous and ongoing basis"); *Republic of China: The Olympics Countdown—Failing to Keep Human Rights Promises*, AMNESTY INT'L, Sept. 21, 2006, <http://web.amnesty.org/library/index/ENGASA170462006> [hereinafter *Olympics Countdown*] (asserting that obtaining actual consent in a penal context is impossible due to the "trauma" and "anguish" of execution); *The World Medical Association Council Resolution on Organ Donation in China* [hereinafter *WMA Resolution*], adopted at the 173rd World Medical Association Council Session, Divonne-les-Bains, France, May 2005, available at [http://www.wma.net/e/policy/cr\\_5.htm](http://www.wma.net/e/policy/cr_5.htm) (condemning organ procurement when consent is not given by executed prisoners, and when there is no opportunity to refuse the procedure); HUMAN RIGHTS WATCH/ASIA, *supra* note 2 (arguing that organ procurement should be abolished because of the difficulty of obtaining actual consent in a criminal justice context).

<sup>15</sup> See *Hearings*, *supra* note 1, at 57, 67 (detailing instances of prisoner abuse); Geoffrey Crothall, *Executions 'Main Source of Organs' for Transplant Programme*, S. CHINA MORNING POST, Aug. 29 1994, at 1, available at 1994 WLNR 2313630 (outlining forms of prisoner abuse that occur during organ procurement). See also Duncan Hewitt, *Shanghai Balks at Organ Donation*, BBC NEWS, Nov. 20, 2000, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1032537.stm> (suggesting that a primary fault in China's organ-procurement law is the lack of penal measures for the commercial use of organs).

<sup>16</sup> Examples of human rights criticisms based on international standards include: Amnesty International's position that the profit motive behind organ-procurement will sustain and possibly increase the Chinese government's application of the death penalty, see *Olympics Countdown*, *supra* note 14 (criticizing China's organ-procurement practice for failing to conform to international standards on informed consent); *Hearings*, *supra* note 1, at 9-10, 12 (calling for an end to China's practice of procuring organs from executed prisoners, Deputy Assistant Secretary of State, Michael E. Parmly cites China's poor human rights record, lack of transparency, and deficient enforcement of existing organ-procurement laws); Julie Lerat, *Business Macabre: La Vente d'Organes de Prisonniers Exécutés*, ENSEMBLE CONTRE LA PEINE DE MORT, Jan. 2, 2007, available at <http://www.abolition.fr/ecpm/french/article.php?art=434&subj=142> (criticizing China's involvement in the organ trade, and asserting that this practice creates an obstacle for abolishing the death penalty).

new approach is needed to lend legal support to lobbying efforts, and to present the Chinese government with a more convincing case for reform.

Part II of this Comment outlines China's practice of procuring organs from prisoner cadavers, explaining the Chinese government's strong economic incentive to use prisoner organs for commercial purposes, and detailing human rights groups' criticisms of this practice. Part III asserts that human rights groups' current approach to reforming China's organ-procurement practice is ineffective because it relies on international standards and advocates for broad reforms. Part IV analyzes the legal framework behind China's organ-procurement practice, comparing the recent 2006 Provisions on the transportation of cadavers to China's 1984 Order on the utilization of prisoner corpses, and demonstrating how these laws fail to square with Chinese constitutional principles on human rights. Part V argues that the Chinese constitution must be fully implemented to modify and reform China's organ-procurement laws. Part VI recommends human rights groups target their criticisms at ending the most serious instances of prisoner abuse, and endorsing the application of Chinese constitutional human rights requirements to lobby more effectively for reforms. Part VII concludes this comment.

## II. HUMAN RIGHTS GROUPS ASSERT CHINA'S USE OF PRISONER ORGANS RESULTS IN ABUSE BECAUSE IT IS DRIVEN BY ECONOMIC INTERESTS AND AUTHORIZED BY DEFICIENT LAWS

In many parts of the world, there is a wide disparity between the demand and the supply of available transplant organs.<sup>17</sup> Confronted with long waiting lists, and the close prospect of death, patients from around the globe are traveling to China to obtain transplant organs for a price.<sup>18</sup> The Chinese government's harsh penal system and legalized practice of procuring organs from prisoner cadavers yields a large supply of human

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<sup>17</sup> D.J. Rothman et al., *Bellagio Task Force Report on Transplantation, Bodily Integrity, and the International Traffic in Organs*, 29 *TRANSPLANTATION PROCEEDINGS* 2739-45 (1997) <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JNYK>; David McNeill & Clifford Coonan, *Japanese Flock to China for Organ Transplants*, *ASIA TIMES*, Apr. 4, 2006, available at <http://www.atimes.com/atimes/China/HD04Ad01.html>; *Hearings*, *supra* note 1, at 63 (reporting that there are not enough organs to meet the demand for transplant surgeries in the United States).

<sup>18</sup> McNeill & Coonan, *supra* note 17 (discussing how patients from Japan, Malaysia, Canada, and the U.S. receive organ transplants in China); *U.S. Patients Line Up for Inmates' Organs*, *FINANCIAL TIMES* (Eng.), Nov. 12, 2001, available at 2001 WLNR 6259236 (describing how patients from the U.S., Japan, and Southeast Asia are purchasing prisoner organs in China); Vanessa Hua, *Patients Seeking Transplants Turn to China: Rights Activists Fear Organs Are Taken from Executed Prisoners*, *S. F. CHRON.*, Apr. 17, 2006, available at 2006 WLNR 6395567; Ros Davidson, *Death Row Black Market for Organs*, *SUNDAY HERALD* (Eng.), Nov. 25 2001, available at 2001 WLNR 3856091.

transplant organs.<sup>19</sup> Consequently, the Chinese government has developed a highly lucrative, yet clandestine market for the sale of prisoner organs.<sup>20</sup> Foreigners are often willing to pay tens of thousands of dollars to receive organ transplants in China that would take years to obtain in their home countries, and many of these patients are undeterred by the knowledge that transplant organs are culled from prisoner corpses.<sup>21</sup> In response to China's commercial use of prisoner organs, and mounting evidence of prisoner abuse, human rights groups worry that China's organ-procurement practice leads to the mistreatment of prisoners.<sup>22</sup>

A. *The High Global Demand for Transplant Organs Presents China with a Strong Economic Incentive to Sell Prisoner Body Parts*

Internationally, the demand for transplant organs greatly exceeds the supply, creating a shortage of organs in many parts of the world.<sup>23</sup> In China,

<sup>19</sup> 1984 Order, *supra* note 2 (legalizing the use of prisoner organs for transplant and research purposes); Tim Johnson, *China's Organ Supply Questioned as Transplants Soar*, SAN JOSE MERCURY NEWS, Apr. 13, 2006, at A1, available at 2006 WLNR 6213327 (discussing China's "seemingly endless" supply of organs due to the Chinese government's prolific use of the death penalty). See also Stanley Oziewicz, *Shady World of Transplant Tourism in China Exposed*, S. CHINA MORNING POST, June 5, 2001, at 14, available at 2001 WLNR 3736410 (reporting that a Canadian business targets China because it considers it to be the largest available source of human transplant organs).

<sup>20</sup> See Davidson, *supra* note 18 (reporting that China's underground sales of prisoner organs create a highly lucrative business); Jane Macartney, *China to 'Tidy Up' Trade in Executed Prisoners' Organs*, TIMES ONLINE (Eng.), Dec. 3, 2005, <http://www.timesonline.co.uk/article/0,,25689-1901558,00.html> (discussing the "big business" of organ transplant surgery in China); Vivian Wu, *Removing Stigma From a Noble Cause*, S. CHINA MORNING POST, Apr. 1, 2006, at 6, available at 2006 WLNR 5420456 (reporting that a large industry has grown around the practice of selling Chinese prisoners' organs to foreign buyers, and that Chinese hospitals have endeavored to keep the source of transplant organs secret); Sonya Bryskine, *Organ Trade Booming in China*, EPOCH TIMES (P.R.C.), Mar. 15, 2006, <http://www.theepochtimes.com/news/6-3-15/39332.html> (last visited Feb. 7, 2007) (discussing China's "flourishing organ trade," and the secret nature of China's organ-procurement practice).

<sup>21</sup> See Erik Baard & Rebecca Cooney, *The People's Republic Has Long Been Suspected of Selling Organs from Prisoners: Now One New York Doctor Knows the Rumors are True*, VILLAGE VOICE, May 2-8, 2001, available at <http://www.villagevoice.com/news/0118,baard,24344,1.html>; *Desperate Singaporeans Seek Kidney Transplants in China*, AGENCE FRANCE PRESSE, Dec. 3, 2006, available at [www.westlaw.com](http://www.westlaw.com) (World News); Mark Magnier & Alan Zarembo, *China Admits Taking Executed Prisoners' Organs*, L.A. TIMES, Nov. 18, 2006, available at <http://www.latimes.com/la-fg-organs18nov18,0,4772205.story?coll=la-home-headlines> (describing cases in which foreign patients spent thousands of dollars to obtain transplants in China).

<sup>22</sup> See, e.g., Letter to the Editor, *Organ Harvesting in China Must End*, NORTHCHIFFE NEWSPAPERS (Eng.), Sept. 7, 2006, at 20, available at 2006 WLNR 15554830 (contending China's practice of procuring organs must end because it violates the human rights of Chinese prisoners); Rothman et al., *supra* note 17 (asserting that organ procurement is "subject to gross abuse" because the practice is kept secret); Johnson, *supra* note 19 (expressing concern that prisoners are not always respected during organ procurement); *Olympics Countdown*, *supra* note 14 (discussing how China's profit motive and record of corruption may lead to abusive practices in organ procurement).

<sup>23</sup> See *Force the Dead to Donate Organs*, BBC NEWS, Feb. 17, 1999, <http://news.bbc.co.uk/1/hi/health/281404.stm> (Dr. John Harris, of the British Medical Association's Ethics Committee, stated,

Transplant organ supplies are limited due to low donation numbers and strict national regulations.<sup>24</sup> In countries such as the United States, Malaysia, Australia, and the United Kingdom, patients often spend years on waiting lists to receive vital organs.<sup>25</sup> Consequently, patients who can afford to purchase organs abroad travel to China to obtain transplant surgeries.<sup>26</sup>

Human rights critics assert China's organ-procurement laws and widespread use of the death penalty provide a consistent source of executed prisoners for transplant purposes.<sup>27</sup> Some Chinese transplant specialists estimate that up to ninety-nine percent of the organs used for transplant surgeries in China come from prisoner cadavers.<sup>28</sup> Current Chinese media reports claim China performs an average of 10,000 transplant surgeries annually, out of approximately two million domestic requests for organs.<sup>29</sup>

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"Thousand[s] of people in the UK, and tens of thousands world-wide, are dying because of the shortage of organs"); Craig S. Smith, *Doctor Says He Took Transplant Organs from Executed Prisoner*, N. Y. TIMES, June 29, 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9F02EED81739F93AA15755C0A9679C8B63&sec=health&pagewanted=all>; cf. Nancy Scheper-Hughes, *The New Cannibalism*, NEW INTERNATIONALIST, Apr. 1998, available at <http://sunsite.berkeley.edu/biotech/organswatch/pages/cannibalism.html> (arguing that modern cultures have developed an artificial need for transplant organs); Julia Rommelfanger, *Kidney for Cash: Organ Trafficking Poses New Challenges*, MEDSCAPE MEDICAL NEWS, Oct. 18, 2005.

<sup>24</sup> See *Foreigners Seeking Transplants Come to China for Organs of Executed Prisoners*, LAOGAI RESEARCH FOUND., Apr. 12, 2006, <http://www.laogai.org/news/newsdetail.php?id=2528> (last visited Feb. 7, 2007); Geoffrey Crothall, *supra* note 15; Craig S. Smith, *Quandary in U.S. Over Use of Organs of Chinese Inmates*, N.Y. TIMES, Nov. 11, 2001, available at <http://query.nytimes.com/gst/fullpage.html?sec=health&res> (detailing how many foreign patients seek transplants from China due to the lack of available organs in their home countries); *Hearings*, *supra* note 1, at 63; Rommelfanger, *supra* note 23 (testifying at the 12th Congress of the European Society for Organ Transplantation, Dr. Jose Fernando Teixeira, president of the European Transplant Coordinators Organization, said patients turn to China for organ transplants due to restricted donation in their home countries).

<sup>25</sup> See Smith, *supra* note 24; BBC NEWS, *Gaining Kidney From an Execution*, June 28, 2001, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1412467.stm> (reporting that due to Malaysia's sixteen-year waiting list to obtain transplant organs, a Malaysian woman purchased a prisoner's kidney in China).

<sup>26</sup> See, e.g., McNeill & Coonan, *supra* note 17 (reporting that wealthy Japanese patients obtain organ transplants in China); Julian Siddle, *Global Demand Fuels Human Organ Trade*, BBC NEWS, June 28, 2001, <http://news.bbc.co.uk/1/low/world/asia-pacific/1412348.stm> (discussing Dr. Wang Guoqi's testimony that prisoner organs are sold to rich foreigners); Smith, *supra* note 23 (reporting that although patients travel to countries such as India, Russia, and the Philippines to purchase transplants, China is considered as one of the top suppliers of transplant organs); Deborah L. Shelton, *Organ Trade in China Raises Alarm Over Human Rights*, ST. LOUIS POST-DISPATCH, Aug. 24, 2006, at A1, available at 2006 WLNR 14481146 (detailing how foreign patients purchase transplant organs in China).

<sup>27</sup> See HUMAN RIGHTS WATCH/ASIA, *supra* note 2; 1984 Order, *supra* note 2 (authorizing organ procurement from prisoner cadavers); Ella Lee, *Bumper Organ Supply Before Lunar Festival*, S. CHINA MORNING POST, Jan. 9, 2000, at 3, available at 2000 WLNR 3477087 (reporting that mass executions, conducted during Chinese festivals, provide 'adequate supplies' of organs from executed prisoners); Craig S. Smith, *On Death Row, China's Source of Transplants*, N.Y. TIMES, Oct. 18, 2001, available at <http://query.nytimes.com/gst/fullpage.html?res=9B00E4D7143EF93BA25753C1A9679C8B63&sec=health&spon=&pagewanted=all> (reporting that executed prisoners are China's main source of transplant organs).

<sup>28</sup> *Olympics Countdown*, *supra* note 14.

<sup>29</sup> *Group Urges China to Detail Transplants*, USA TODAY, Nov. 19, 2006 [http://www.usatoday.com/news/world/2006-11-19-china-prisoners\\_x.htm?csp=34](http://www.usatoday.com/news/world/2006-11-19-china-prisoners_x.htm?csp=34) (reporting that Deputy

The actual figures are difficult to verify due to state secrecy surrounding the practice.<sup>30</sup> Additionally, medical and technological capabilities for organ removal and transplant surgery continue to advance in China, making once sophisticated procedures readily obtainable.<sup>31</sup> In terms of supply, analysts report that up to sixty-eight offenses are punishable by the death penalty in China, and execution numbers soar during China's periodical "Strike-Hard" campaigns.<sup>32</sup> Such programs enhance the penalty for many non-violent crimes.<sup>33</sup> There is an especially high death toll during the Chinese lunar holiday when the Chinese government conducts mass executions.<sup>34</sup> China's penal system ultimately increases the flow of prisoner cadavers to the Chinese transplant network.<sup>35</sup>

The renewable source of prisoner organs provides the Chinese government with a strong economic incentive to sell human organs to foreign buyers.<sup>36</sup> Due to the high global demand for transplant organs and

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Prime Minister Huang Jiefu estimates that 10,000 transplants were conducted by the Chinese government last year, out of nearly 1.5 million domestic requests for organs); *China Bans Trade in Human Organs*, CHINA DAILY, July 16, 2006, available at [http://www.chinadaily.com.cn/china/2006-07/16/content\\_641780.htm](http://www.chinadaily.com.cn/china/2006-07/16/content_641780.htm).

<sup>30</sup> See, e.g., *Hearings*, *supra* note 1, at 10 (asserting that real documentation of China's organ-procurement practice is impossible due to the Chinese government's tendency to conceal its execution practices and conduct criminal justice operations behind closed-doors). See also Mike Steketee, *Diplomacy Transplant*, THE AUSTL., July 29, 2006, at 20, available at 2006 WLNR 13054451 (contending that China's lack of formal reporting must improve to end human rights abuses in organ-procurement); Bryskine, *supra* note 20 (discussing how the lack of transparency in China's organ-procurement practice makes it difficult to document the practice).

<sup>31</sup> See, e.g., Johnson, *supra* note 19 (reporting that China's increasing medical sophistication contributes to its organ-procurement program); HUMAN RIGHTS WATCH/ASIA, *supra* note 2 (discussing how Chinese medical developments have facilitated organ procurement).

<sup>32</sup> Calum MacLeod, *China Makes Ultimate Punishment Mobile: Fatal Injections Administered from Vehicles*, USA TODAY, June 15, 2006, at 8A, available at 2006 WLNR 10282717. See also Baard & Cooney, *supra* note 21; HUMAN RIGHTS WATCH/ASIA, *supra* note 2; *Hearings*, *supra* note 1, at 57; Peter Nestor, *When the Price is Too High: Rethinking China's Deterrence Strategy for Robbery*, PAC. RIM L. & POL'Y J., Date, p 454-55 (discussing "Strike-Hard" campaigns and the death penalty in China); Stephen Gregory, *Harvesting Organs in China: the Preparation Sujiatun*, EPOCH TIMES (P.R.C), 2005, <http://en.epochtimes.com/news/6-3-30/39868.html> (last visited Feb. 7, 2007) (stating that seventy offenses are punishable by death in China).

<sup>33</sup> HUMAN RIGHTS WATCH/ASIA, *supra* note 2.

<sup>34</sup> See Baard & Cooney, *supra* note 21; Lee, *supra* note 27; *Dead Prisoners' Organs for Sale*, S. CHINA MORNING POST, Jan. 9, 2000, at 1, available at 2000 WLNR 3476902. See also Nestor *supra*, note 32, at 455 (citing Murray Scott Tanner, *Campaign-Style Policing in China and Its Critics*, in CRIME, PUNISHMENT AND POLICING IN CHINA, 179 (Borge Bakken ed., 2005) (discussing how most executions occur around Chinese holidays including New Year, Lunar New Year, May Day, Tiananmen Anniversary, and the October National Holiday).

<sup>35</sup> See Gregory, *supra* note 32; *Foreigners Seeking Transplants Come to China for Organs of Executed Prisoners*, *supra* note 24 (asserting that China's supply of transplant organ is due to its prolific use of the death penalty).

<sup>36</sup> See *Organ Transplant Regulation Drafted*, PEOPLE'S DAILY ONLINE, Mar. 13, 2006, [http://english.peopledaily.com.cn/200603/13/eng20060313\\_250155.html](http://english.peopledaily.com.cn/200603/13/eng20060313_250155.html) (noting that the global shortage in human organs presents the Chinese government with a lucrative market for human organs); Jill



China's large supply of prisoner cadavers, the Chinese government is ideally poised to make lucrative gains from the sale of prisoner organs on the international black market.<sup>37</sup> Over the past ten years, China has become a popular destination for foreigners in search of transplant organs.<sup>38</sup> Foreign patients pay as much as \$200,000 for an organ transplant.<sup>39</sup> International doctors have reported numerous cases in which patients have traveled to China to receive transplant organs from executed prisoners.<sup>40</sup> Such reports surfaced in the United States in 2001 when New York-based surgeon, Dr. Thomas Diflo, consulted with several patients in need of post-operation care after purchasing prisoner organs from the Chinese government.<sup>41</sup> In 2001, the Japanese Department of Health launched an investigation into the Chinese organ-procurement practice after a number of Japanese patients experienced life-threatening complications with kidney transplants obtained in China.<sup>42</sup> Although the Chinese government recently enacted the 2006 Provisions on the "Treatment of Cadavers" to prohibit the commercial use of

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McGivering, 'China Selling Prisoners' Organs', BBC NEWS, Apr. 19, 2006, <http://news.bbc.co.uk/1/hi/world/asia-pacific/4921116.stm>; *Dead Prisoners' Organs for Sale*, *supra* 34; Erik Eckholm, *Arrests Put Focus on Human Organs from China*, N.Y. TIMES, Feb. 25, 1998, available at <http://topics.nytimes.com/top/news/international/countriesandterritories/china/index.html?offset=360>.

<sup>37</sup> See Christine Gorman et al., *Body Parts for Sale*, TIME MAGAZINE, Mar. 9, 1998, available at <http://www.time.com/time/magazine/article/0,9171,987948,00.html?promoid=googlep> (reporting that the international demand for human organs provides the Chinese government with an economic incentive to sell prisoner organs); Gregory, *supra* note 32 (discussing the "big business" of organ transplantation in China); Ian Cobain and Adam Luck, *The Beauty Products From the Skin of Executed Chinese Prisoners*, THE GUARDIAN, Sept. 13, 2005, available at <http://www.guardian.co.uk/china/story/0,7369,1568622,00.html> (indicating that China earns revenues by channeling organs from executed prisoners into the cosmetic industry, which uses the skin from cadavers as an "aesthetic filler" in beauty products); Don MacKay, *Prisoners Killed for Organs*, THE MIRROR (Eng.), Apr. 20, 2006, at 15, available at 2006 WLNR 6594837 (calling China's practice of selling prisoners' organs "widespread and growing").

<sup>38</sup> See Erik Eckholm, *supra* 36 (reporting that patients from Taiwan, Hong Kong, and Singapore travel to China to obtain transplant organs for a premium price due to organ shortages in their home countries); *Organ Trade Confirmed*, DAILY TELEGRAPH (Sydney), Sept. 29, 2006, at 33, available at 2006 WLNR 16815206 (reporting that China's booming organ trade is "targeted" at foreign patients); Oziewicz, *supra* note 19. See also Jo Revill, *UK Kidney Patients Head for China*, OBSERVER INT'L (Eng.), Dec. 11, 2005, available at <http://www.guardian.co.uk/china/story/0,,1664750,00.html> (reporting that British and Australian patients are enticed by the prospect of obtaining organ transplants in China).

<sup>39</sup> See Siddle, *supra* note 26 (reporting that foreigners pay more than \$100,000 for the cost of travel and obtaining an organ transplant in China); Mariana Wan & Simon Beck, *Organs of Prisoners Used in Ops*, S. CHINA MORNING POST, July 25, 1993, at 1, available at 1993 WLNR 2196543; Sally Guyoncourt, *Death Row Transplant Scandal*, DAILY EXPRESS (Eng.), Sept. 28, 2006, available at 2006 WLNR 16789146 (reporting that a top Chinese surgeon offered to sell a liver to an undercover journalist for £50,000); Rommelfanger, *supra* note 23; Shelton, *supra* note 26.

<sup>40</sup> See Baard & Cooney, *supra* note 21. See also TAIPEI TIMES, *China's Death Penalty is Blamed for Organ Trade*, Jan. 10, 2001, available at <http://www.taipetimes.com/News/front/archives/2000/01/10/18972> (Dr. Lo Chung-man, a Hong Kong transplant surgeon, said his team counsels patients against transplants in China because they come from executed prisoners).

<sup>41</sup> Baard & Cooney, *supra* note 21.

<sup>42</sup> McNeill & Coonan, *supra* note 17.

human organs, human rights analysts remain wary that China's persistent profit motive to sell prisoner cadavers will trump the government's adherence to its new ban.<sup>43</sup>

*B. Human Rights Groups Advocate for the Elimination of China's Procurement of Prisoner Organs Because It Results in Abuse*

Human rights analysts express concern that China's economic incentive to sell transplant organs poses a conflict of interest between the government's profit motive and the treatment of prisoners.<sup>44</sup> Transplant interests dictate the time and course of execution procedures, often resulting in the physical abuse of prisoners.<sup>45</sup> Many Chinese doctors describe incidents in which executions are purposely mishandled and prisoners are kept alive during the organ-removal process to preserve the tissue for transplantation.<sup>46</sup> Human rights organizations additionally report that executions are routinely tailored according to specific transplant needs.<sup>47</sup> For example, prisoners are shot in the head for kidney removal, and shot in

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<sup>43</sup> MacLeod, *supra* note 32. See Provisions on the Administration of Entry and Exit of Cadavers (promulgated by the Standing Comm. Nat'l People's Cong., July 3, 2006, effective Aug. 1, 2006) available at [http://www.whrw.org/reports/1994/china1/china\\_948.htm#N\\_100](http://www.whrw.org/reports/1994/china1/china_948.htm#N_100) [hereinafter 2006 Provisions]; *Effort to Regulate Organ Trade May Not Be Enough*, S. CHINA MORNING POST, Nov. 16, 2006, at 14, available at 2006 WLNR 19850604 (asserting that China's 2006 Provisions fail to address some of the biggest concerns involved in organ-procurement); Shelton, *supra* note 26 (reporting that human rights groups are concerned China's 2006 regulation will not be fully applied due to government corruption and strong economic motivation to continue selling prisoner organs).

<sup>44</sup> See, e.g., McGivering, *supra* note 36 (Professor Steven Wigmore, chair of the Ethics Committee at the British Transplantation Society, says its time for the medical profession to condemn China's practice of procuring organs from executed prisoners due to mounting evidence that these organs are used for commercial purposes). See also *Foreigners Seeking Transplants Come to China for Organs of Executed Prisoners* (human rights groups are worried that organs are obtained from Chinese prisoners without their consent); *Group Urges China to Detail Transplants*, *supra* 29 (Health Ministry Spokesman Mao Qun'an admitted that China's use of prisoner organs for trade purposes lead to "improper" transplants); Magnier & Zarembo, *supra* note 21 (Chinese Attorney Zhu Gongwei contends that the absence of proper organ procurement regulation has led people to "cut corners for a quick profit").

<sup>45</sup> See *Organs Are "Stolen" for Transplants*, W. DAILY PRESS (Eng.), Apr. 20, 2006, at 10, available at 2006 WLNR 6659346; Robert MacPherson, *Britons Warned Over China's Harvested Transplants*, AGENCE FR. PRESSE, Apr. 19, 2006, available at 2006 WLNR 191350; *Crackdown on Tourist Trade in Body Parts*, N. Z. HERALD, Nov. 18, 2006, at B11, available at 2006 WLNR 19968296 (alleging that Chinese prisoners are "executed to order," and that prisoners' blood samples are matched with transplant recipients prior to execution); *Hearings*, *supra* note 1, at 57-58 (describing how blood samples are taken from prisoners prior to execution).

<sup>46</sup> See Baard & Cooney, *supra* note 21 (Wei Jingsheng, Chinese human rights activist and former political prisoner, testified that China's organ-procurement procedures are routinely used as the means of execution, asserting "no one cares if [the prisoners] are alive or dead"); Crothall, *supra* note 15; Smith, *supra* note 24.

<sup>47</sup> See *Hearings*, *supra* note 1, at 57 (describing how the Chinese government prioritizes organ procurement over the human treatment of prisoners); Crothall, *supra* note 15 (detailing how transplant needs direct the course of China's organ-procurement practice).

the chest for cornea operations.<sup>48</sup> Prisoners are also given anti-coagulation shots prior to execution to ease the organ-procurement surgery, and the date and time of execution is scheduled based on the transplant recipient's request.<sup>49</sup> An Australian newspaper recently revealed that the Chinese government uses specially equipped "execution buses" to procure organs from death-row prisoners.<sup>50</sup> For these reasons, human rights groups and medical organizations contend China's zeal for utilizing prisoner organs for commercial purposes compromises the humane treatment of death-row prisoners.<sup>51</sup> Due to the frequency of prisoner abuse, the Chinese government's strong economic interest in prisoner organs, and the lack of transparency in Chinese execution procedures, human rights groups condemn the organ-procurement practice and press for its abolition.<sup>52</sup>

### III. HUMAN RIGHTS GROUPS' CURRENT LOBBYING EFFORT IS INEFFECTIVE AT PERSUADING CHINA TO IMPLEMENT REFORMS

Human rights groups' present approach to promoting reforms in China's organ-procurement practice is unnecessarily overbroad and misdirected at China's adoption of international standards.<sup>53</sup> Human rights

<sup>48</sup> Baard & Cooney, *supra* note 21.

<sup>49</sup> See, e.g., *Id.* (claiming that Chinese hospitals are tipped-off by judges as to when executions are scheduled to occur); Scheper-Hughes, *supra* note 23 (reporting that a wealthy Chinese man was able to quickly obtain a transplant organ from an executed prisoner); *Hearings*, *supra* note 1, at 57-58 (describing how blood samples are taken from prisoners prior to execution).

<sup>50</sup> Kim MacDonald, *China Death Buses Linked to Organ Transplant Trade*, W. AUSTL., Oct. 6, 2006, at 8, available at 2006 WLNR 17293057; MacLeod, *supra* note 32.

<sup>51</sup> See *Desperate Singaporeans Seek Kidney Transplant in China*, *supra* note 21; Shelton, *supra* note 26; *Foreigners Seeking Transplants Come to China for Organs of Executed Prisoners*, *supra* note 24 (discussing China's "soaring business" in conducting organ transplant surgeries on foreign patients); USA TODAY, *supra* 29 (claiming China's practice of removing prisoner organs is "profit-driven with little regard for medical ethics"); *Organs of Executed up for Sale*, DAILY EXPRESS (Eng.), Apr. 20, 2006, available at 2006 WLNR 6598612.

<sup>52</sup> See, e.g., *China's Regulation Banning Human Organ Trade Takes Effect*, PEOPLE'S DAILY ONLINE, July 2, 2006, <http://english.peopledaily.com.cn/200607/02/eng20060702> (reporting that China's organ trade is severely criticized abroad); Rommelfanger, *supra* note 23 (discussing how international doctors think the sale of transplant organs is unethical); Wan & Beck, *supra* note 39 (reporting that Dr. Huang Chen-ya, a Chinese legislator, condemns China's procurement of prisoner organs as a violation of human rights); see also Rothman et al., *supra* note 17 (asserting that international medical and human rights organizations oppose China's sale of human organs); Crothall, *supra* note 15 (positing that the presence of doctors at execution sites is unethical); Gregory, *supra* note 32 (asserting that organ procurement is conducted in secrecy, and that the practice is unethical and inhumane).

<sup>53</sup> See HUMAN RIGHTS WATCH/ASIA, *supra* note 2 (criticizing multiple aspects of China's organ-procurement and death penalty systems, and endorsing international standards on human rights); *Executed According to What Law? - the Death Penalty in China*, AMNESTY INT'L, AI Index ASA 17/003/2004, Mar. 22, 2004, <http://web.amnesty.org/library/index/engasa170032004> (condemning China's organ-procurement and death penalty practices, and recommending broad reforms in accordance with international human rights dictates); Scheper-Hughes, *supra* note 23 (reporting that the World Medical Association condemns

groups press China to eliminate organ procurement from prisoner cadavers, and to reform other aspects of the Chinese penal system that facilitate this practice.<sup>54</sup> They also premise their reform efforts on China's adoption of international instruments and ethical standards.<sup>55</sup> Human rights advocates view these instruments as the gold-standard on humanitarian protection, but such devices are unlikely to change China's stance on organ procurement because they lack legal resonance in the Chinese system.<sup>56</sup>

#### A. *International Standards Offer Weak Legal Support for Reform Arguments*

Human rights groups' current effort to eliminate prisoner abuse in China's organ-procurement practice is ineffective because it focuses on China's adoption of international standards. Human rights lobbyists advocate organ-procurement reforms by encouraging China to adopt the collective ethical position expressed in international standards and resolutions.<sup>57</sup> These instruments provide an instructive framework for

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China's organ-procurement practice); Eckholm, *supra* note 36 (criticizing China's financial incentive to sell prisoners' organs).

<sup>54</sup> See, e.g., Steketee, *supra* note 30 (asserting that China's use of prisoner cadavers in organ procurement is an "abhorrent" violation of human rights, which continues in opposition to the international position on organ transplantation); Shar Adams, *Australian Surgeons Condemn "Horrific" Organ Trade*, EPOCH TIMES (P.R.C.), Apr. 30, 2006, <http://en.epochtimes.com/news/6-4-30/41024.html> (last visited Feb. 7, 2007) (discussing Australian doctors' condemnations of China's sale of prisoner organs); HUMAN RIGHTS WATCH/ASIA, *supra* note 2 (discussing how China's organ procurement program contravenes international human rights principles); *Olympics Countdown*, *supra* note 14 (reporting that the death penalty contributes to the organ procurement program, and condemning both of these practices as a violation of human rights); Editorial, *Harvest of Shame China Should Halt Sale of Organs from Executed Prisoners*, COLUMBUS DISPATCH, Nov. 27, 2006, at A1, available at 2006 WLNR 20514461; Rothman et al., *supra* note 17 (calling on China to stop organ procurement from executed prisoners); Eckholm, *supra* note 38 (asserting that there is a strong connection between China's death penalty and organ-procurement programs).

<sup>55</sup> See generally, *Executed According to What Law? - the Death Penalty in China*, *supra* note 53 (criticizing China's failure to curb its use of the death penalty, and including the Chinese constitution in its list of international instruments on human rights); *Olympics Countdown*, *supra* note 14 (asserting that China's organ procurement program violates international ethical standards).

<sup>56</sup> Human rights organizations generally fail to support organ-procurement reforms with Chinese law, see HUMAN RIGHTS WATCH/ASIA, *supra* note 2; Rothman et al., *supra* note 17; *Hearings*, *supra* note 1, at 9 (calling on China to end organ-procurement from prisoner cadavers because it violates international human rights law and medical ethical standards.); Debra J. Saunders, Editorial, *Global Bazaar in Body Parts*, S. F. CHRON., July 20, 2006, at B9, available at 2006 WLNR 12469628 (discussing Canadian human rights efforts to combat China's use and sale of prisoner organs, and concluding that "Western democracies" must be pro-active in ending the practice).

<sup>57</sup> Examples of international instruments currently endorsed by human rights groups include: *Resolution on Physician's Conduct Concerning Human Organ Transplantation*, THE WORLD MEDICAL ASS'N, adopted by the Forty-Sixth World Medical Association's General Assembly in Stockholm, Sweden, Sept. 1994, available at <http://www1.umn.edu/humanrts/instree/physicianconduct.html>; *WMA Resolution*, *supra* note 14; The United Nations' Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, ¶ 5,

human rights protections, but they have no basis in Chinese law or policy.<sup>58</sup> They fail to correspond to traditional Chinese viewpoints, and they risk being seen as an affront to China's fervently defended views on national autonomy.<sup>59</sup> Any benefit derived from the promotion of international standards is more than off-set by the potential for such efforts to appear culturally intrusive.<sup>60</sup>

*B. Promoting Broad Reforms Obscures the Fundamental Issue of Ending Prisoner Abuse*

Human rights groups' present campaign to protect prisoners from abuse is unfeasible because it advocates for sweeping reforms in multiple areas of China's criminal justice system. Some of the most vocal human rights organizations contend that China's organ-procurement practice, and the death penalty scheme that fuels it, must be fully reformed in order to adequately protect prisoners from abuse.<sup>61</sup> It may be desirable, from a human rights standpoint, to completely abolish both the death penalty and the organ-procurement practices in China,<sup>62</sup> but such reforms are unrealistically overbroad, and ultimately unnecessary to end the procedural and physical abuses that result from procurement procedures.<sup>63</sup> Moreover, framing organ-procurement abuses as resolvable only through the

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U.N. Doc. A/RES/45/111 (Dec. 14, 1990), available at <http://www.un.org/documents/ga/res/45/a45r111.htm>. See also Rothman et al., *supra* note 17; *Olympics Countdown*, *supra* note 14.

<sup>58</sup> See *Hearings*, *supra* note 1, at 9-10 (asserting that China must conform to international human rights standards); WMA Resolution, *supra* note 14; *Olympics Countdown*, *supra* note 14 (stating that China's organ-procurement practice violates international human rights standards, such as the charter for the Olympic Games, which provides for "the preservation of human dignity"); *Fundamental Principles of Olympianism, The Olympic Charter*, Sept. 1, 2004, at 9, available at [http://www.olympic.org/uk/organisation/missions/charter\\_uk.asp](http://www.olympic.org/uk/organisation/missions/charter_uk.asp); HUMAN RIGHTS WATCH/ASIA, *supra* note 2 (directing recommendations at China's medical community, Chinese doctors are called upon to comply with the U.N.'s "Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment").

<sup>59</sup> See Wu, *supra* note 20 (emphasizing China's social and cultural acceptance of organ-procurement from prisoner cadavers, Professor Chen Zhonghua asks the international community to assess the situation from both perspectives, and to understand China's social and ethical position).

<sup>60</sup> See *Hearings*, *supra* note 1, at 9, 12 (testifying before the U.S. Congress, Principal Deputy Assistant Secretary of State Michael Parmly calls on China to comply with international standards).

<sup>61</sup> *Id.* at 1, 13-14.

<sup>62</sup> See, e.g., HUMAN RIGHTS WATCH/ASIA, *supra* note 2 (discussing the close connection between China's organ-procurement program and China's widespread use of the death penalty).

<sup>63</sup> *Id.* See also *Olympics Countdown*, *supra* note 14; Cooney & Baard, *supra* note 21; Sherri Williams, *China's Prisoner Abuse Unjust, Protestors Say*, COLUMBUS DISPATCH, Apr. 26, 2006, at 06a, available at 2006 WLNR 17811697 (alleging that the Chinese government harvests organs from political prisoners who are still alive).

implementation of far-reaching reforms presents the Chinese government with a weaker case for ending prisoner abuse.<sup>64</sup>

First, endorsing the complete cessation of China's organ-procurement practice is not the only means by which to ensure that prisoners are protected from abuse. Human rights groups contend China's practice of procuring organs from executed prisoners must be eliminated because it constitutes an inherent breach of human rights.<sup>65</sup> Prisoner abuse is attributable, however, to deficiencies in the text and application of China's organ-procurement law, rather than to the existence of the practice itself.<sup>66</sup> Prisoner abuse is eradicable through the enactment of tighter regulations and the inclusion of controlling human rights protections.<sup>67</sup> It is unnecessary to press for the total abolition of organ procurement in prisons because modifying, rather than eliminating, the practice can curb prisoner abuse.<sup>68</sup> It is also unrealistic to press for the total abolition of China's organ-procurement practice because the Chinese government depends on prisoner organs for nearly all domestic transplant and research purposes.<sup>69</sup> It is unreasonable to require China to fully discontinue organ procurement from prisoner cadavers when prisoner corpses would otherwise be cremated if not used for transplantation.<sup>70</sup>

Second, as some analysts have stressed, pressing for the total abolition of organ procurement in prisons risks driving China's current participation in the organ trade further underground.<sup>71</sup> China has historically conducted organ sales on the black market to avoid international scrutiny, and to benefit from the absence of regulation.<sup>72</sup> China's long-held policy of maintaining

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<sup>64</sup> See *Olympics Countdown*, *supra* note 14 (asserting that China's organ procurement program is an adverse effect of the country's death penalty system, and promoting reforms in both of these practices); Stefania Bianchi, *China: Prisoner Consent for Organ Harvest Flawed-Amnesty*, INTER PRESS SERVICE (Eng.), May 11, 2006, available at <http://www.westlaw.com> (World News).

<sup>65</sup> See HUMAN RIGHTS WATCH/ASIA, *supra* note 2; Gregory *supra* note 32 (arguing that organ procurement denies prisoners the right to their own bodies).

<sup>66</sup> See Vivian Wu, *Transplant Guidelines Taking Shape: Document to Outline Ethical Principles for Procurement*, S. CHINA MORNING POST, Oct. 24, 2006, at 9, available at 2006 WLNR 18395399; Gregory, *supra* note 32 (describing instances of prisoner abuse).

<sup>67</sup> China's existing organ-procurement regulations are habitually misapplied and ignore. See *infra* Part IV.A.

<sup>68</sup> See Wu, *supra* note 20 (quoting Professor Chen, who suggests that China's organ-procurement practice can be improved by strengthening regulations and enforcement measures).

<sup>69</sup> *Id.* See also Shelton, *supra* note 26; Wu, *supra* note 66 (considering the high demand for transplant organs, Chinese officials say the new regulations will not eliminate the sale of prisoners' organs).

<sup>70</sup> See 1984 Order, *supra* note 2 § 5 (providing that prisoner corpses be cremated).

<sup>71</sup> Hewitt, *supra* note 15 (reporting that legislation aimed at restricting China's organ trade could lead to an increase in organ smuggling); Rothman et. al., *supra* note 17.

<sup>72</sup> See John Augustyn, *New Details of China's Death Camp Emerge*, EPOCH TIMES (P.R.C.), Mar. 17, 2006, available at <http://en.epochtimes.com/news/6-3-17/39420.html> (last visited Feb. 7, 2007); Baard & Cooney, *supra* note 21.

secrecy and using underground channels to profit from the sale of prisoner organs demonstrate its tendency to shield its involvement in controversial practices from international observation.<sup>73</sup> Endorsing sweeping reforms is problematic because it threatens to prompt the Chinese government to further conceal its organ-procurement activities if such reforms are perceived as unfeasible or intimidating.

Third, advocating for the elimination of the death penalty confuses the issue of ending prisoner abuse and broadens the scope of reform efforts. Human rights groups view prisoner abuse as a direct outgrowth of China's death penalty system, which provides executed cadavers into Chinese transplant units.<sup>74</sup> Although the death penalty enables the organ-procurement practice by supplying corpses, it does not directly account for the prisoner abuse that occurs during organ-procurement procedures.<sup>75</sup> Instances of prisoner abuse, such as that witnessed by Dr. Guoqi, arise during the preoperation and execution processes.<sup>76</sup> The death penalty has no bearing on how prisoners are treated during the course of organ-removal procedures, and it has no effect on the efficacy or application of Chinese organ-procurement law.<sup>77</sup>

Using the prisoner abuse issue as a segue into the death-penalty debate is also counterproductive to reform efforts because it has the unwanted effect of expanding the scope of the organ-procurement problem into more controversial areas of China's penal system, and confusing the elimination of prisoner abuse with the elimination of capital punishment. Regardless of whether the Chinese government's use of the death penalty increases or declines over time, improving the treatment of death-row prisoners can be accomplished without involving China's death-penalty practice.<sup>78</sup> Pressing for the abolition of the death penalty to cure deficiencies

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<sup>73</sup> See *Foreigners Seeking Transplants Come to China for Organs of Executed Prisoners*, *supra* note 24 (demonstrating China's tendency to shield its criminal justice practices from international observation); Smith, *supra* note 27.

<sup>74</sup> Hua, *supra* note 18; *China's Death Penalty is Blamed for Organ Trade*, *supra* note 40 (posing as a relative of a transplant patient, a reporter visited China's Sun Yat-sen University of Medical Sciences Hospital No.1 in Guangzhou. He was told that he could purchase a transplant organ, and that the best time to obtain it was during the Chinese Lunar New Year when the most executions are performed). See Lerat, *supra* note 16; Scheper-Hughes, *supra* note 23.

<sup>75</sup> See *Foreigners Seeking Transplants Come to China for Organs of Executed Prisoners*, *supra* note 24.

<sup>76</sup> See Part I (discussing Dr. Wang Guoqi's testimony about instances in which prisoners were physically abused during the organ removal process); *Organs Are 'Stolen' for Transplants*, *supra* note 45.

<sup>77</sup> Cf. *Olympics Countdown*, *supra* note 14; HUMAN RIGHTS WATCH/ASIA, *supra* note 2.

<sup>78</sup> *Id.*

in China's organ-procurement program is an ineffective strategy for reform.<sup>79</sup>

#### IV. CHINA'S CURRENT ORGAN-PROCUREMENT LAW LACKS CLEAR PARAMETERS AND CONFLICTS WITH CHINESE CONSTITUTIONAL PROSCRIPTIONS ON HUMAN RIGHTS

China's seminal 1984 Order on the "Utilization of Prisoner Cadavers" serves as the sole legal authority for organ procurement from executed prisoners.<sup>80</sup> Although the 1984 Order establishes basic guidelines,<sup>81</sup> human rights groups assert this law lacks the necessary regulations to safeguard prisoners from abuse.<sup>82</sup> In response to these concerns, China recently enacted the 2006 Provisions on the "Entry and Exit of Cadavers," which bar the commercial use of human organs.<sup>83</sup> Critics assert this law is unlikely to curb China's role in the organ trade because it gives the Chinese government ultimate discretion over whether to approve cadaver exports and does nothing to reduce China's core economic interest in utilizing prisoner cadavers for commerce.<sup>84</sup> The 2006 Provisions do not address the issue of organ procurement from prisoner cadavers.<sup>85</sup> Consequently, the 1984 Order is still controlling over China's organ-procurement practice, and its attendant faults remain unaltered.<sup>86</sup> Viewed against the Chinese constitutional requirement to protect and preserve human rights, China's current organ-

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<sup>79</sup> See also Macartney, *supra* note 20 (estimating that China executes more people than the rest of the world combined).

<sup>80</sup> 1984 Order, *supra* note 2 (authorizing the use of prisoner cadavers for transplant purposes).

<sup>81</sup> *Id.* § 3 (providing that prisoner corpses can be used for procurement purposes when: (1) a permit is issued to qualified doctors; (2) a city prefectorate arranges the utilization of corpses; and (3) an order is issued to the "utilizing unit" to notify doctors of the availability of an executed cadaver after consent is obtained; (4) an effort is made to keep organ-procurement secret; (5) a timely cremation occurs postprocurement; and, (6) an exemption is granted for national minorities, which, in principle, cannot be used for organ-procurement). See also Wu, *supra* note 20 (Chen Zhonghua, a Chinese professor, asserts China's organ-procurement practice must be subject to tighter regulations in order to protect prisoners from abuse).

<sup>82</sup> See Baard & Cooney, *supra* note 21 (condemning China's organ-procurement practice as a "gross violation of human rights," Dr. Diflo detailed his experience with American patients, who received transplant organs in China); Wan & Beck, *supra* note 39; McGivering, *supra* note 36; *Organs Are 'Stolen' for Transplants*, *supra* note 45.

<sup>83</sup> 2006 Provisions, *supra* note 43.

<sup>84</sup> *Id.*

<sup>85</sup> See *infra* Part IV.A.

<sup>86</sup> China promulgated the 2006 Provisions to strengthen organ transplant requirements, but this law does not address the use of prisoners' organs, nor establish rules for organ-removal procedures. See *infra* Part IV.B. See also *China to Tighten Rules on Organ Transplants*, AUSTL. BROAD. CORP., Nov. 28, 2006, available at 2006 WLNR 20564134 (reporting that China will tighten regulations on its organ-procurement practice).



procurement scheme is inconsistent.<sup>87</sup> The Chinese government's on-going failure to address the issue of prisoner abuse and reform its organ-procurement practice constitutes a breach of Chinese constitutional law.<sup>88</sup>

A. *The 1984 Order Authorizes the Use of Prisoner Cadavers for Organ Procurement but Lacks the Necessary Regulation to Protect Prisoners from Abuse*

China's 1984 Order was intended to introduce the practice of extracting organs from prisoner cadavers, and to establish basic parameters for organ procurement.<sup>89</sup> It outlines requirements on prisoner consent and medical supervision, but it fails to include specific regulation on how far the organ-procurement practice can encroach upon China's standard execution process.<sup>90</sup> The 1984 Order also leaves much room for interpretation about how to apply its terms, and how to regulate the actual procurement procedure.<sup>91</sup> Due to these key omissions, the 1984 Order opens the door to procedural and physical abuse, resulting in the improper treatment of prisoners.<sup>92</sup>

The government issued the 1984 Order "to support the advancement of medical research and to help change social customs."<sup>93</sup> It was designed to provide "temporary rules" on organ procurement from executed prisoners, and to gauge political repercussions.<sup>94</sup> China originally endeavored to keep the existence of the 1984 Order confidential to avoid international scrutiny.<sup>95</sup> Until recently, China categorically denied that it procured organs from prisoner cadavers.<sup>96</sup> Chinese government spokespeople now admit that

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<sup>87</sup> XIAN FA art. 33, § 3 (1982) (P.R.C.) [Constitution] (full text is available online at the National People's Congress of the People's Republic of China), available at <http://www.npc.gov.cn/zgrdw/english/constitution/constToDetail.jsp?id=full&pages=3#Chapter2>.

<sup>88</sup> See *infra* Part IV.C.

<sup>89</sup> 1984 Order, *supra* note 2.

<sup>90</sup> *Id.* §§ 1, 3.

<sup>91</sup> Wan & Beck, *supra* note 39.

<sup>92</sup> See *Hearings*, *supra* note 1, at 57.

<sup>93</sup> 1984 Order, *supra* note 2.

<sup>94</sup> *Id.*

<sup>95</sup> Wan & Beck, *supra* note 39.

<sup>96</sup> S. CHINA MORNING POST, June 29, 2001, at 9, available at 2001 WLNR 3730332 (reporting that Chinese government spokesman Zhang Qiyue refuted claims that China harvests organs from executed prisoners, denouncing the allegations as "vicious slander" and "sensational lies," and maintaining that China's primary source of organs is public donation). See also *Beijing's Empty Words-Chinese Government Responds to Accusations*, LAOGAI RESEARCH FOUND., Oct. 16, 1998, <http://www.laogai.org/news/newsdetail.php?id=1988> (last visited Feb. 7, 2007) (speaking on the condition of anonymity, a Chinese government official admitted that China uses prisoner organs, but only when consent is obtained); see *Organ Trade Confirmed*, *supra* note 38 (reporting that Chinese officials rebuke allegations of forcibly taking organs from executed prisoners).

organs are procured from prisoner cadavers, and sometimes sold to foreign buyers.<sup>97</sup> Nonetheless, China insists such practices are used only “in a very few cases.”<sup>98</sup> Although the 1984 Order was never officially passed through the National People's Congress, nor given more than “temporary” legal status, China has neither replaced nor modified its general provisions.<sup>99</sup> In the absence of subsequent legislation, the 1984 Order continues to function as the governing authority on China's practice of procuring organs from executed prisoners.<sup>100</sup>

The 1984 Order provides cursory guidelines on organ procurement, but fails to adequately clarify or restrict extraction procedures. It authorizes organ procurement from prisoner cadavers, focusing on three main areas of regulation.<sup>101</sup> First, the 1984 Order requires consent to be obtained from the prisoner or his family prior to execution.<sup>102</sup> Second, the 1984 Order stipulates that organ procurement can only be performed after death is confirmed by a supervising official.<sup>103</sup> Executions are required to conform to the relevant requirements in Chinese criminal law for “death to be carried-out by means of shooting.”<sup>104</sup> Finally, the 1984 Order mandates that prisoner organ procurement be kept strictly secret to avoid negative political consequences.<sup>105</sup> Medical workers are forbidden from wearing hospital insignia or driving marked vehicles to or from execution sites.<sup>106</sup> These provisions offer general parameters on organ removal, but lack specificity on how to conduct the procurement procedure in accordance with the standard execution protocol.<sup>107</sup>

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<sup>97</sup> Macartney, *supra* note 20 (reporting that the Chinese government admits that organs from executed prisoners are sold to foreign buyers).

<sup>98</sup> See McGivering, *supra* note 36.

<sup>99</sup> 2006 Provisions, *supra* note 43 (omitting provisions on organ-procurement and treatment of prisoners).

<sup>100</sup> See Macartney, *supra* note 20. See also Wu, *supra* note 66 (reporting that the Chinese government is currently drafting the first ethical regulations for organ-procurement); *Foreigners Seeking Transplants Come To China for Organs of Executed Prisoners*, *supra* note 24 (reporting that “permanent” regulations for organ-procurement are currently underway).

<sup>101</sup> Cf. 1984 Order, *supra* note 2, with Gregory, *supra* note 32 (stating that the 1984 Order is unethical because it “involves collusion between security agencies and medical officials”).

<sup>102</sup> 1984 Order, *supra* note 2, §§ 3, 4.

<sup>103</sup> *Id.* § 1 (requiring death to be confirmed by a “supervising procuratorial official” at the execution site).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* § 4; see Wan & Beck, *supra* note 39.

<sup>106</sup> 1984 Order, *supra* note 2, § 4-4.

<sup>107</sup> *Id.* § 4, 1-3 (focusing on the bureaucratic aspects of organ-procurement, detailing procedures for obtaining permits and authorization, but leaving blank the question of how to conduct actual organ-procurement procedures and preoperation treatment of death-row prisoners). See also Wu, *supra* note 66 (reporting that the 2006 Provisions fail to address key issues, including the source of organs, the administration of the procurement process, and the definition of death).

The absence of adequate regulation in China's 1984 Order produces repeated instances of procedural and physical abuse.<sup>108</sup> The extent of the 1984 Order's human rights protections is limited to requirements on prior consent and *post-mortem* extraction.<sup>109</sup> It lacks rules on how to conduct the actual procurement process, thereby failing to protect prisoners from the physical and procedural abuse that occur during organ removal.<sup>110</sup> It also fails to indicate how death is determined.<sup>111</sup> Moreover, China's 1984 Order provides no direction on how organ procurement should square with standard execution guidelines.<sup>112</sup>

Due to the lack of straightforward regulations, the 1984 Order is also frequently misapplied.<sup>113</sup> Reports from Chinese doctors demonstrate that some of the most extreme cases of prisoner abuse occur in violation of the 1984 Order's existing textual requirements.<sup>114</sup> Instances in which organs are extracted from live prisoners and executions are intentionally botched clearly contravene the 1984 Order's stipulation that organ removal begin only after death is declared and conducted.<sup>115</sup> These cases of abuse speak to a problem of misapplication rather than textual deficiency, and they underscore how the lack of specific regulations on how to define and determine death opens the door to instances of live extraction.<sup>116</sup>

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<sup>108</sup> Johnson, *supra* note 19 (reporting that Chinese Foreign Ministry Official Liu Jianchao admits that a "legal vacuum" exists in China's current organ-procurement regulations).

<sup>109</sup> 1984 Order, *supra* note 2, § 1, 3.

<sup>110</sup> 1984 Order, *supra* note 2 (failing to include regulations on how to remove organs from prisoners' bodies, and how to determine clinical death). *See also Hearings*, *supra* note 1, at 57-58 (providing examples of prisoner abuse that occur as a result of China's current organ-procurement scheme); *China's Death Penalty is Blamed for Organ Trade*, *supra* note 40 (stating that China has "no national law governing organ donation," referring to the government's lack of regulation on the organ-procurement practice).

<sup>111</sup> 1984 Order, *supra* note 2, § 1 (indicating that the meaning of "death" is subject only to confirmation by supervisory officials).

<sup>112</sup> *Id.* (providing that prisoners sentenced to death are to be executed "in accordance with the relevant provisions of the Criminal Law: the [death penalty] is to be carried out by means of shooting." This is the only reference in the 1984 Order's text that stipulates how organ-procurement is meant to accord with the standard execution process). *See also Foreigners Seeking Transplants Come to China for Organs of Executed Prisoners*, *supra* note 24 (reporting that Foreign Ministry Official Liu Jianchao dismissed allegations of that organs were taken from executed prisoners at jail camps, but recognized China's lack of strict organ-procurement regulation).

<sup>113</sup> *See also U.S. Patients Line Up for Inmates' Organs*, *supra* note 18; Gregory, *supra* note 32. HUMAN RIGHTS WATCH/ASIA, *supra* note 2.

<sup>114</sup> 1984 Order, *supra* note 2. Smith, *supra* note 27. *See also Scheper-Hughes*, *supra* note 23 (reporting instances in which organs are extracted from live, anaesthetized prisoners).

<sup>115</sup> 1984 Order, *supra* note 2; *Hearings*, *supra* note 1, at 57. *See Crothall*, *supra* note 15.

<sup>116</sup> *See Macartney*, *supra* note 20 (reporting that Chinese Deputy Prime Minister Huang Jiefu said there is a need for tighter organ-procurement regulation in China); Smith, *supra* note 27; *U.S. Patients Line Up for Inmates' Organs*, *supra* note 18.

B. *The 2006 Provisions Ban the Commercial Use of Organs, but Fail to Modify China's Current Organ-Procurement Scheme*

China enacted the 2006 "Provisions on the Entry and Exit of Cadavers and Treatment of Cadavers" to regulate the transport of human corpses.<sup>117</sup> Although the 2006 Provisions prohibit trading in human organs, this law does not address the operation of China's organ-procurement practice.<sup>118</sup> On its own terms, critics assert the 2006 Provisions are unlikely to end China's participation in the organ trade because they leave the ultimate discretion on all export matters to the Chinese government.<sup>119</sup> More importantly, compared to the 1984 Order, the 2006 Provisions make no significant modifications to China's organ-procurement law, entirely omitting reference to the use of prisoner cadavers.<sup>120</sup> The 2006 Provisions fail to effect formal organ-procurement reform, and they fail to alter the 1984 Order's regulatory scheme.

The 2006 Provisions were intended to assuage international fears about China's role in the global organ trade.<sup>121</sup> They were issued as a set of "strict rules" meant to quell "fierce overseas criticism" and for the purpose of "protecting public interests, maintaining public ethics, and preventing infectious diseases from spreading."<sup>122</sup> Although the Chinese government has characterized the 2006 Provisions as a reform measure, this law primarily functions as a customs regulation on the transport and quarantine of human cadavers.<sup>123</sup> It was drafted to restrict the postprocurement transport of human organs and thus does not affect how organ-procurement procedures are regulated or conducted.<sup>124</sup>

The 2006 Provisions' most significant feature is a ban on trading in human organs. Under Article 8, "It is strictly prohibited to trade in cadavers, and to make use of cadavers to engage in commercial activities."<sup>125</sup> The

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<sup>117</sup> 2006 Provisions, *supra* note 43; see also *China Bans Trade in Human Organs*, *supra* note 29.

<sup>118</sup> 2006 Provisions, *supra* note 43, art. 8.

<sup>119</sup> *Beijing's Empty Words-Chinese Government Responds to Accusations*, *supra* note 96 (asserting that the 2006 Provisions will be ineffective at curbing China's commercial use of organs because "the directive does not prohibit the government itself from engaging in the organ trade").

<sup>120</sup> Wu, *supra* note 66.

<sup>121</sup> *China's Regulation Banning Human Organ Trade Takes Effect*, *supra* note 52 (reporting that the 2006 Provisions were enacted to quell international concerns about China's participation in the global organ trade).

<sup>122</sup> See *Id.*; 2006 Provisions, *supra* note 43, art. 1.

<sup>123</sup> See *China Issues Human Organ Transplant Regulation*, PEOPLE'S DAILY, Mar. 28, 2006, [http://english.people.com.cn/200603/28/eng20060328\\_253961.html](http://english.people.com.cn/200603/28/eng20060328_253961.html) (reporting that the 2006 Provisions were intended to "guarantee medical safety and the health of patients").

<sup>124</sup> See Hua, *supra* note 18.

<sup>125</sup> 2006 Provisions, *supra* note 43, art. 8.

term “cadaver” is defined in Article 2 as “dead human bodies and the specimens thereof,” including human organs, bones, and tissue.<sup>126</sup> Although Article 8 seemingly provides an absolute bar to China’s commercial use of human organs, human rights groups assert that the efficacy of this law is jeopardized by its certification process, which gives the Chinese government full discretion to approve the transport of corpses.<sup>127</sup> Under Article 7, if customs officials are presented with a valid certificate, the cadaver is released.<sup>128</sup> The 2006 Provisions give no indication, however, about what is involved in issuing a certificate, or what, if any, standards are applicable.<sup>129</sup> Although shipment certificates must be ratified by Chinese agencies, the 2006 Provisions provide no criteria for granting certificates and require no documentation of the cadaver’s place of origin.<sup>130</sup> This malleable certification system, combined with the Chinese government’s strong economic incentive to profit from the sale of human organs, indicates that the 2006 Provisions will not be effective at eliminating China’s use of human cadavers for commercial purposes.<sup>131</sup>

Compared to the 1984 Order, the 2006 Provisions do not adequately modify China’s organ-procurement regulations. They fail to include restrictions on the use of prisoner cadavers, and they impose no requirements on the actual organ-procurement practice.<sup>132</sup> The 2006 Provisions ultimately provide no guidance on how to resolve the conflict between meeting transplant needs and providing for the humane treatment of prisoners.<sup>133</sup> Whereas the 1984 Order regulates the preprocurement conditions, such as consent, authorization, and notification of execution, the 2006 Provisions govern the postprocurement utilization of organs and

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<sup>126</sup> *Id.* art. 2.

<sup>127</sup> *Id.* art. 8; *see also China Issues Human Organ Transplant Regulation*, *supra* note 123 (including statements from Chinese Ministry of Health spokesman Mao Qun’an, noting that the 2006 Provisions serve as a “temporary” law).

<sup>128</sup> 2006 Provisions, *supra* note 43, art. 7.

<sup>129</sup> *Id.* (omitting provisions on how certificates are evaluated by the Chinese government).

<sup>130</sup> Wu, *supra* note 66.

<sup>131</sup> *See* Leu, *supra* note 15; *cf. with* Bianchi, *supra* note 64 (claiming China’s new regulations are unlikely to work as long as the death penalty remains in wide use); Jonathan Watts, *Beijing Cracks Down on Organ Transplant Trade*, IRISH TIMES, Mar. 29, 2006, at 12, *available at* 2006 WLNR 5210748 (discussing human rights groups’ concern that Chinese hospitals will not adhere to the new regulations to avoid the loss of revenues); *Crackdown on Tourist Trade in Body Parts*, *supra* note 45 (describing China’s lucrative trade in human organs and its recent regulation to ban the sale of human organs).

<sup>132</sup> *See Organ Transplant Regulation Drafted*, *supra* note 36 (National People’s Congress Deputy Chen Haixiao worries that China’s progress toward enacting needed human rights legislation in organ-procurement is too slow).

<sup>133</sup> *See generally* 2006 Provisions, *supra* note 43 (reporting that the Chinese government issued organ-transport requirements, which are limited to basic licensing guidelines).

cadavers.<sup>134</sup> Neither of these regulations establishes guidelines on how actual procurement and preoperation treatment should be conducted.<sup>135</sup> This void in legal depth and clarity has not only roused reproach from human rights groups, but has also prompted some Chinese legislators to voice concerns about the practice.<sup>136</sup>

C. *China's Organ-Procurement Laws Conflict with Chinese Constitutional Requirements to Protect Human Rights*

China's organ-procurement laws conflict with Chinese constitutional proscriptions on human rights because they allow for prisoner abuse.<sup>137</sup> Viewed against Article 33, Section 3, China's current organ-procurement laws lack sufficient regulations to protect prisoners from abuse.<sup>138</sup> The 1984 Order establishes few limitations on how to conduct organ procurement, and it supplies no safeguards to ensure that prisoners are treated in accordance with the government's obligation to protect and preserve human rights.<sup>139</sup> Article 33, Section 3, requires the state to procure organs in conformity with human rights requirements and to fully incorporate these rules in its organ-procurement scheme.<sup>140</sup> China's organ-procurement practice violates these proscriptions by allowing for prisoner abuse, creating an enduring conflict between the Chinese constitution and organ procurement in China.

D. *China's Organ-Procurement Laws Fail to Pass Muster Under the Chinese Constitution Because They Allow for Prisoner Abuse*

China's twenty-year failure to reform organ-procurement rules and implement human rights standards represents an ongoing violation of Chinese constitutional requirements.<sup>141</sup> The Chinese constitution was

<sup>134</sup> 1984 Order, *supra* note 2, Sections 2-4; *China Issues Human Organ Transplant Regulation*, *supra* note 123 (emphasizing how the 2006 Provisions are intended to impose restrictions on organ-procurement).

<sup>135</sup> 1984 Order, *supra* note 2; *cf. with* 2006 Provisions, *supra* note 43.

<sup>136</sup> See *Organ Transplant Regulation Drafted*, *supra* note 36 (worrying that China's progress toward enacting "needed human rights legislation" in organ-procurement is too slow, National People's Congress Deputy Chen Haixiao discusses the medical and ethical issues involved); *China Regulations: Organs from Executed Prisoners Declared Legal*, EIU VIEWSWIRE CHINA, Oct. 9, 2006, at 1, available at 2006 WLNR 18182244 (reporting that China publicly denies that prisoner organs are used for commercial needs).

<sup>137</sup> 1984 Order, *supra* note 2; 2006 Provisions, *supra* note 43 (giving the ultimate discretion on the transport of cadavers to Chinese government officials).

<sup>138</sup> See *supra* Part IV, A, B.

<sup>139</sup> 1984 Order, *supra* note 2; 2006 Provisions, *supra* note 43; Constitution, *supra* note 87, art. 33, § 3.

<sup>140</sup> Constitution, *supra* note 87, art. 33, § 3.

<sup>141</sup> See also Baard & Cooney, *supra* note 21 (human rights activists condemn the 1984 Order as a breach of human rights, contending that prisoner consent to organ-procurement is dubious at best, and that China has generally ignored consent requirements in order to meet transplant needs).

intended to establish uniform national standards and provide binding legal authority over all national laws.<sup>142</sup> The constitution's preamble explicitly requires its full implementation into Chinese law to "reunify" the motherland under socialist policy.<sup>143</sup> China originally ratified its constitution on December 4, 1982, adding amendments in 1988, 1993, 1999, and 2004.<sup>144</sup> These amendments primarily impose economic restrictions, but the 2004 regulation includes an important provision on the protection of human rights.<sup>145</sup> China views its constitutional requirements as "entrenched," serving as "the highest and fundamental law" of the land.<sup>146</sup> Chinese governmental literature confirms that the constitution is binding on all domestic law and drafted to strike regulations that conflict with its requirements.<sup>147</sup> Any legal provision that conflicts with the Chinese constitution is void.<sup>148</sup>

#### V. THE CHINESE CONSTITUTION PROVIDES STRONG LEGAL AUTHORITY FOR PROMOTING HUMAN RIGHTS REFORMS

The Chinese constitution is imbued with the requisite wording and legal authority to lend support to reforms in China's organ-procurement practice. It functions as the supreme law of the land and requires the implementation of its proscriptions in all areas of domestic law.<sup>149</sup> In comparison to international standards, the Chinese constitution serves as an effective tool by which to end prisoner abuse because it provides the Chinese government with a domestic source of human rights standards. Due to its familiarity in the Chinese system and its command over Chinese law, China's constitution provides a sound legal basis and a strong source of support for efforts to eliminate prisoner abuse in organ procurement.

##### A. *China's Constitution Is an Effective Legal Tool to End Prisoner Abuse in Organ Procurement*

As the supreme law of the land, the Chinese constitution provides strong legal support for reform arguments because it contains binding legal

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<sup>142</sup> Constitution, *supra* note 87, pmbl.

<sup>143</sup> *Id.*

<sup>144</sup> A. Tschentscher, *International Constitutional Law Project*, UNIVERSITÄT BERN, Mar. 16, 2004, available at <http://www.oefre.unibe.ch/law/icl/ch00000.html> (editor's note to the constitution).

<sup>145</sup> Constitution, *supra* note 87.

<sup>146</sup> China Law Reports: Criminal Law 1992-1994 xxi-xxiv (Priscilla Leung Mei-fun ed., China Law and Culture Publications Ltd., 2001) [hereinafter *China Law Reports*].

<sup>147</sup> *Id.* at xxiv.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

authority and the capacity to strike laws that conflict with its requirements.<sup>150</sup> Nowhere in the Chinese constitution does it indicate that prisoners are exempt from human rights protections.<sup>151</sup> Whereas Article 34 expressly provides that electoral rights are available to all Chinese citizens, "except persons deprived of political rights according to law," Article 33, Section 3, makes no such exception to its requirement that human rights be preserved.<sup>152</sup> This section's broad mandate on the protection of human rights is applicable to cure deficiencies in the 1984 Order by requiring China to bring existing organ-procurement regulations within the ambit of Chinese constitutional proscriptions.<sup>153</sup> For the 1984 Order to pass constitutional muster, it must be enacted into formal law and modified from its present form to include comprehensive regulation of organ procurement. It must explicitly prohibit live extractions and establish how organ procurement is meant to accord with execution procedures. The Chinese constitution provides a viable basis for promoting reforms because it is binding authority over organ-procurement law and requires the Chinese government to adhere to its mandate on the protection of human rights.

The Chinese constitution provides a stronger foundation for reform arguments than international instruments. The Chinese constitution lends greater legal support to reform efforts because it is a product of domestic Chinese law and policy.<sup>154</sup> Whereas international standards lack resonance in the Chinese system, the Chinese constitution has important value as a binding and accepted legal standard.<sup>155</sup> The Chinese constitution is embedded in the Chinese legal system and is designed to be fully implemented in Chinese law.<sup>156</sup> Though comprised of some international language and terminology, it possesses more legal authority and commands greater government adherence than international human rights instruments. Due to the China's firm stance against the imposition of foreign values, reform arguments grounded in Chinese constitutional principles are more likely to draw support from the Chinese government.

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<sup>150</sup> *Id.*

<sup>151</sup> Constitution, *supra* note 87.

<sup>152</sup> *Id.* art. 33, § 3; art. 34.

<sup>153</sup> *Id.* art. 33, § 3.

<sup>154</sup> The preamble outlines China's general policy considerations, emphasizing freedom from foreign interference and rebirth of nationalism, which indicates that the Chinese government is predisposed against international legal and political intrusions, *see* Constitution, *supra* note 87, pmbl.

<sup>155</sup> *See Id.*; *China Law Reports*, *supra* note 146 (characterizing the constitution as "an entrenched piece of legislation").

<sup>156</sup> Constitution, *supra* note 87, pmbl. (providing that "[all people] . . . have the duty to uphold the dignity of the Constitution and ensure its implementation").



B. *Chinese Constitutional Human Rights Requirements Are Applicable to Cure Defects in China's Organ-Procurement Law*

The Chinese constitution provides strong support for lobbying efforts because it broadly promotes the protection of human rights and requires that these guidelines be implemented in all areas of Chinese law.<sup>157</sup> The implementation of Article 33, Section 3 is required by Chinese law and encouraged by the Chinese government's current effort to square constitutional mandates with conflicting national regulations.<sup>158</sup> Although China's constitution does not function as a penal instrument and cannot be used to seek redress for grievances against the government, it is capable of directly striking regulations that conflict with its tenets.<sup>159</sup>

Chinese constitutional laws are designed to be fully implemented and enforced, and recent trends demonstrate China's effort to incorporate these standards into its national legal scheme.<sup>160</sup> In June 2001, the Chinese government appointed a standing committee to examine domestic laws contrary to Chinese constitutional requirements and weed out provisions of Chinese law that fail to accord with constitutional strictures.<sup>161</sup> Additionally, China's legal system is evolving, and the Chinese government seeks to improve and develop organ-procurement laws.<sup>162</sup> The introduction of the Chinese constitution and the recent 2004 amendment on human rights demonstrate that China is willing to enact progressive legal reforms.<sup>163</sup> Using the Chinese constitution to support reform efforts is a persuasive lobbying tactic because it presents the Chinese government with compelling legal support for modifying organ-procurement law.

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<sup>157</sup> *Id.* See *China Law Reports*, *supra* note 146, at xxiv (discussing how most constitutional provisions are implemented into domestic Chinese law, but broad provisions require enforcement at lower levels).

<sup>158</sup> Constitution, *supra* note 87; *China Law Reports*, *supra* note 146, at xxiv; *New Agency Set Up to See to Constitution Application*, PEOPLE'S DAILY ONLINE, June 21, 2004, [http://www.chinadaily.com.cn/english/doc/2004-06/21/content\\_341048.htm](http://www.chinadaily.com.cn/english/doc/2004-06/21/content_341048.htm) [hereinafter *New Agency*].

<sup>159</sup> *China Law Reports*, *supra* note 146; see also Albert Y. Chen, *An Introduction to the Legal System of the People's Republic of China* 45-47 (1992).

<sup>160</sup> See *China Law Reports*, *supra* note 146, at xxiv; Constitution, *supra* note 87, pmbl. See also Chen, *supra* note 159.

<sup>161</sup> *New Agency*, *supra* note 158 (reporting that in May 2004, China appointed a Standing Committee in the National People's Congress to review whether national regulations conform to Chinese constitutional requirements. The purpose of the committee is to "safeguard legislative unity" and to ensure that all domestic legislation operates in accordance with Chinese constitutional principles).

<sup>162</sup> See, e.g., *Organ Transplant Regulation*, *supra* note 136; Revill, *supra* note 38 (reporting that Chinese Deputy Prime Minister Huang Jiefu wants to tighten and standardize China's organ-procurement practice).

<sup>163</sup> Constitution, *supra* note 87; see also *New Agency*, *supra* note 161.

VI. HUMAN RIGHTS GROUPS MUST NARROW THE FOCUS OF REFORM EFFORTS AND ENDORSE THE CHINESE CONSTITUTION TO ELIMINATE PRISONER ABUSE

Human rights groups must change their current strategy to accomplish reforms in China's organ-procurement practice. The Chinese constitution requires domestic laws to conform to its prescriptions, and the Chinese government must modify its existing body of organ-procurement laws in order to meet these requirements. Although it remains an uphill battle to convince the Chinese government to implement the necessary safeguards for death-row prisoners, the Chinese government is less likely to reject reform efforts that draw from Chinese constitutional law than from international ethical standards. Human rights groups must narrow the focus of their criticisms and promote Chinese constitutional human rights protections to make a more compelling argument for reform.

A. *China's Organ-Procurement Laws Must Be Modified to End Prisoner Abuse by Conforming to Chinese Constitutional Requirements*

China must enact new provisions that expressly forbid prisoner abuse by establishing clear parameters for organ removal. These regulations should reiterate "after death" requirements, specifically barring the use of live extractions under any circumstance. New regulations also must specify how organ-procurement laws are meant to accord with execution procedure, mandating that organ-procurement surgeries follow the predetermined execution schedule rather than allowing schedules to be set in accordance with last-minute transplant needs. Prisoners must be adequately notified of the date and time of execution, and executions must not be conducted prior to the original date. Provisions also must stipulate that the prisoner is informed of the purpose of anticoagulation shots and other medical treatment performed to facilitate organ removal.

B. *Modification of China's Organ-Procurement Laws Must Include Enforcement Measures to Ensure the Efficacy of Legal Reforms*

Due to the significant gaps in human rights protections in the current procurement law and lack of permanence in the controlling 1984 Order, reforms are needed to provide more comprehensive regulation of organ procurement and to eliminate areas of abuse. New regulation must include an oversight system and provide requirements on monitoring the procurement of prisoner organs. Human rights groups have suggested that

China keep records of all transplant procedures, including the time and date of procurement, the type of organ procured, and the name of the prisoner involved.<sup>164</sup> To add another layer of protection, new procurement rules must include penal measures for officials who fail to conduct procurement according to established law.

*C. Reform Efforts Must Focus on Eliminating the Most Serious Instances of Abuse Rather Than Promoting Broad-Based Reforms*

Human rights groups must prioritize the elimination of prisoner abuse itself, instead of calling for the widespread reform of the China's criminal justice practices. It may be preferable to eliminate the organ-procurement and death-penalty practices as the means to achieve reforms, but these measures are an unnecessary and unrealistic way to end prisoner abuse. From a tactical standpoint, human rights groups must narrow the scope of their criticisms because the problem of prisoner abuse can be solved without questioning the legitimacy of the organ procurement and death penalty practices. Additionally, eliminating the discussion of these practices enables the Chinese government to review the core problem of prisoner abuse without being encumbered by the controversial and confusing aspects of adjunct reform issues. Tailoring the scope of reforms to the specific elimination of prisoner abuse avoids confusing the issue with other areas of Chinese criminal-justice operations, and is more likely to appeal to the Chinese government.

*D. Human Rights Groups Must Endorse the Chinese Constitution Rather Than International Instruments to Promote the End of Prisoner Abuse*

Human rights groups must promote China's constitutional protections to strengthen the legal basis behind their reform efforts. The Chinese constitution includes the requisite human rights language and principles to eradicate prisoner abuses in the organ-procurement practice. As the supreme law of China, the constitution provides the legal authority necessary to support and promote reform efforts. In comparison with international standards and instruments, Chinese constitutional requirements on human rights are already embedded in the country's legal tradition and respected by the Chinese government. It is unnecessary for human rights groups to promote reforms by endorsing international standards when the Chinese constitution already provides such a framework. Chinese constitutional

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<sup>164</sup> See HUMAN RIGHTS WATCH/ASIA, *supra* note 2.

principles on human rights provide the necessary text and wording to lend legal support to organ-procurement reforms. Moreover, because the Chinese constitution is imbued with binding authority and integrally rooted in the Chinese legal system, it provides a compelling basis for advancing human rights reforms in the organ-procurement practice. Instead of pressuring China to conform to international standards, human rights groups must endorse the implementation of Chinese constitutional requirements on human rights to make a more persuasive case for eliminating prisoner abuse.

## VII. CONCLUSION

The Chinese constitution must be endorsed to lend legal support to reform efforts and to encourage the Chinese government to modify its organ-procurement law in accordance with Chinese constitutional human rights standards. Human rights groups must restructure reform arguments in such a way as to draw maximum support from the Chinese government, rather than press for grand-scale legal modifications that risk appearing culturally intrusive and substantively overbroad. The Chinese constitution provides an effective means of eliminating prisoner abuse in organ procurement because its text can be directly applied to forbid the mistreatment of prisoners. To make a stronger case for the elimination of prisoner abuse, human rights groups must narrow the focus of reform efforts and promote the application of Chinese constitutional protections to cure human rights deficiencies in China's organ-procurement practice.